

Staff Briefing Papers

Meeting Date: February 15, 2019

Agenda Item **2

Company: Freeborn Wind Energy LLC

Docket No. **IP6946/TL-17-322**

In the Matter of the Application of Freeborn Wind Energy LLC for a Route Permit for the 161 kV Freeborn Wind Farm Transmission Line and Associated Facilities in Freeborn County

Issues: What action(s) should the Commission take, if any, regarding the motions filed to the docket?

Should the Commission reconsider its December 19, 2018 *Order Approving Route Permit* for the Freeborn Wind Transmission Line Project?

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✓ Relevant Documents	Date
Order Issuing Site Permit and Taking Other Action	December 19, 2018
Erratum Notice	December 27, 2018
Association of Freeborn County Landowners (AFCL) – Petition for Reconsideration	January 8, 2019
Allie Olson Petition for Reconsideration	January 8, 2019
Dorene Hanson Petition for Reconsideration	January 8, 2019
Freeborn Wind Answer to Petitions for Reconsideration (2 parts)	January 18, 2019
Freeborn Wind Motion to Strike Untimely Petition and Non-Record Evidence	January 18, 2019
AFCL Response to Freeborn Wind’s Motion to Strike and Motion to Strike Applicant’s Answer (2 parts)	January 28, 2019
Freeborn Wind Response in Opposition to AFCL’s Motion to Strike	January 31, 2019

The Commission has the authority to accept or decline a petition for reconsideration with or without a hearing or oral argument. Minnesota Rules 7829.3000, Subpart 6. In other words, a decision on a petition for reconsideration can be made without taking oral comments at the Commission meeting.

These materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

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I. STATEMENT OF THE ISSUES

What action(s) should the Commission take, if any, regarding the motions filed to the docket?

Should the Commission reconsider its December 19, 2018 *Order Approving Route Permit* for the Freeborn Wind Transmission Line Project?

II. STATUTES AND RULES

Under Minn. Stat. § 216B.27 and Minn. R. 7829.3000, a party or a person aggrieved and directly affected by a Commission decision or order may file a petition for reconsideration within 20 days of the date the decision or order is issued. A petition for reconsideration must set forth the specific grounds relied upon or the errors claimed. Other parties to the proceeding may file answers to the petition within ten days of the reconsideration petition. The Commission has the authority to decide a petition for reconsideration with or without a hearing or oral argument. The Commission may reverse, change, modify, or suspend its original decision if it finds its decision unlawful or unreasonable.

III. PROCEDURAL HISTORY

On December 19, 2018, the Commission issued its *Order Issuing Site Permit and Taking Other Action*. On December 27, 2019, the Commission issued a notice including attachments inadvertently omitted from the original order.

On January 8, 2019, the Association of Freeborn County Landowners (AFCL) filed a petition for reconsideration of the Commission's order.

On January 8, 2019, Allie Olson requested reconsideration of the route permit conditions.

On January 8, 2019, Dorenne Hansen requested reconsideration of the route permit conditions.

On January 18, 2019, Freeborn Wind Energy LLC (Freeborn Wind) filed a response to the reconsideration petitions and a motion to strike AFCL's petition and non-record evidence.

On January 28, 2019, AFCL filed a response to Freeborn Wind's motion and a motion to strike a portion of Freeborn Wind's motion.

On January 31, 2019, Freeborn Wind filed a response in opposition to AFCL's motion to strike.

IV. Petitions for Reconsideration

Association of Freeborn County Landowners Petition

The AFCL petition alleged the Commission ignored or dismissed information regarding Freeborn Wind's lack of land rights and did not consider alleged fraudulent actions on the part of Freeborn Wind's employees. The petition also alleged that the Commission's process and order were flawed because AFCL's exceptions to the Administrative Law Judge's Report were not included with, or addressed in staff's September 13, 2018 briefing papers recommending approval of the route permit.¹ AFCL alleged its July 13, 2018 motion to suspend the proceedings was ignored by the Commission.² AFCL stated the Commission was not provided an opportunity to consider AFCL's exceptions. AFCL asserted the Commission did not consider new information related to Freeborn Wind's ability to secure land rights for the project and the World Health Organization's October 10, 2018 Environmental Noise Guidelines. AFCL asserted the Commission's decision was flawed due to procedural errors and that the Administrative Law Judge's recommendation is in error of law.

Olson Petition

The Olson petition claims that Freeborn Wind doesn't have sufficient land rights to construct the project, and that a limited liability company does not have the authority to exercise eminent domain. The petition requested the Commission reconsider the route permit for the transmission line and deny the project.

Hansen Petition

The petitioner questioned the Commission's use of the alternative review process for the route permit application. The petition requested the Commission reconsider the route permit for the transmission line and deny the project.

V. Freeborn Wind Reply to Petitions for Reconsideration and Motion to Strike AFCL Petition and Non-Record Evidence

In its January 18, 2019 filings, Freeborn Wind requested that the Commission strike AFCL's Petition as untimely, or alternatively, strike Section VII and Exhibits E-G of AFCL's petition as outside the record. Freeborn Wind noted the AFCL did not label its materials "late filed" or provide a statement as to why the filings were untimely and should not be excluded as

¹ eDockets Number [20189-146381-01](#), September 13, 2018.

² eDockets Number [20187-144869-01](#), July 13, 2018.

required by Minn. R. 7829.0420, subp.2.

Freeborn Wind noted that, under Minn. Stat. § 216B.27, subd. 1; Minn. R. 7829.3000, subp. 1, a petition for reconsideration must be filed within 20 days of service of the Commission's order. Additionally, according to the help page of the eFiling system, any filing received after 4:30 p.m. is deemed filed on the following business day.

As evidence of the filing being late, Exhibit A of Freeborn Wind's motion included an email Confirmation of Completed Official Document Service provided by AFCL with the following date stamp: "Tue, 8 Jan 2019 16:30:56-0600".

Freeborn Wind argued that "allowing this late filing would also be a source of confusion in future proceedings and would require the Commission to ignore Minn. Stat. § 216B.27 and Minn. R. 7829.3000, at great prejudice to other parties."

In the alternative, Freeborn Wind requested the Commission strike AFCL's non-record materials (Section VII and Exhibits E-G of AFCL's petition) from the record. Freeborn Wind asserted that none of the issues raised by AFCL are new and none merit reconsideration of the Commission's order.

Freeborn Wind noted that the AFCL petition raised issues on the exact grounds that the Commission has already considered and rejected, such as the securing of land rights, the actions of land rights agents, and the use of eminent domain. Freeborn Wind stated the petitions do not establish that the Commission's decision to grant a Route Permit was unreasonable or unlawful, and concluded that the petitions should be denied because the petitions set forth no basis for the Commission to reconsider its order.

Regarding the substance of the petitions, Freeborn Wind reiterated that the petitioners failed to satisfy any of the relevant reconsideration criteria and restated arguments that the Commission properly considered and rejected. Freeborn Wind cited information from the record in response to individual concerns raised by the petitioners.

VI. AFCL Response to Freeborn Wind's Motion to Strike and Motion to Strike

In response to Freeborn Wind's motion to strike, AFCL indicated its filing was accepted by the e-Filing system as filed on January 8, 2019 and was therefore timely. AFCL also argued that, under Commission rules, exclusion of a filing is permissive and not mandatory. Minn. R. 7829.0420 provides that the Commission can electively exclude a filing that is late upon a determination that the value in admitting the document is outweighed by the prejudice to a party, participant or public interest caused by the untimeliness. Even if the filing was late, AFCL argued, the Commission should include it. AFCL noted that Freeborn Wind did not claim or

demonstrate any prejudice would be caused by the untimeliness.

AFCL emphasized that it included relevant new information in its reconsideration petition. The new materials included correspondence related to information obtained from a public information request with the Minnesota Office of Attorney General that purportedly might establish the nature of private negotiations between Freeborn Wind and Freeborn County related to acquisition of land rights for the project. AFCL noted that Freeborn Wind referenced this opinion in its January 18 response to AFCL's petition and that its late introduction into the record prejudiced AFCL's position.

AFCL requested that Freeborn Wind's motion to strike be denied in its entirety and requested the Commission sanction Freeborn Wind accordingly.

VII. Freeborn Wind Response in Opposition to AFCL Motion to Strike

On January 31, 2019, Freeborn Wind filed a response to AFCL's motion to strike. In its reply, Freeborn Wind argued the letter referenced in AFCL's motion was not prejudicial to the proceeding and provides legal authority for the Commission's consideration. Freeborn Wind asked the Commission to deny AFCL's motion in its entirety.

VIII. STAFF ANALYSIS

Motions to Strike Petitions and Non-record Evidence

Staff notes that the eFiling system shows that AFCL's Petition for Reconsideration was e-Filed on January 8, 2019 which suggests that the filing was timely. Additionally, the email confirmation of completed official document service indicated that the service was completed at 4:30 p.m. on January 8, 2019.

Petitions for Reconsideration

Staff provides the following clarifications in response to allegations raised in AFCL's petition regarding procedural irregularities. Commission staff reviewed the entire record of the docket. To the extent that an exceptions period applies to the immediate proceeding, such filings are reserved for *parties* to the proceeding.³ AFCL chose not to participate as a party, therefore its exceptions filing to the ALJ Report was not identified as a relevant document in staff briefing papers. Staff emphasizes that the application before the Commission was reviewed under the

³ "...parties shall file and serve on the other parties any exceptions to an administrative law judge's report within 20 days of its filing." Minn. R. 7829.2700, Subp. 1.

Commission's alternative review process; and the Commission did not direct the use of a contested case hearing.

In considering petitions for reconsideration, the Commission should determine whether the petitions: 1) raise new issues; 2) point to new and relevant evidence; 3) expose errors or ambiguities in the underlying order; or 4) otherwise persuade the Commission that it should rethink its previous order.

If the Commission determines there is not sufficient cause, then it should reaffirm the December 19, 2018 Order Approving Route Permit and deny reconsideration. If the Commission decides that it would like to further consider the issues, it can hear additional argument from the petitioner(s) and permittee at the meeting, order that further information be provided or developed through additional written submissions, or by referral back to the Administrative Law Judge with direction on how to proceed.

Should the Commission choose to reconsider its original decision, it will need to decide whether it will reverse, change, modify, or suspend its original decision based on one or more of the reconsideration petitions or on its own motion.

IX. COMMISSION DECISION OPTIONS

A. Motion to Strike

1. Grant the Freeborn Wind Motion to Strike Untimely AFCL Petition for Reconsideration and Non-Record Evidence and strike the AFCL January 8, 2019 Petition for Reconsideration in its entirety
2. Grant the Freeborn Wind Motion to Strike Untimely AFCL Petition for Reconsideration and Non-Record Evidence in part and strike the following portions of the AFCL January 8, 2019 Petition for Reconsideration:
 - a. Section VII
 - b. Exhibit E
 - c. Exhibit F
 - d. Exhibit G
3. Deny the Freeborn Wind Motion to Strike Untimely AFCL Petition for Reconsideration and Non-Record Evidence
4. Grant the AFCL Motion to Strike Attachment A and Associated Argument of Applicant's January 18, 2019 Answer
5. Take some other action deemed appropriate

B. Petitions for Reconsideration

1. On its own motion the Commission could reconsider the December 19 Order
2. Grant the following petitions for reconsideration of the December 19 Order:
 - a. AFCL petition
 - b. Olson petition
 - c. Hansen petition
3. Deny the petitions for reconsideration of the December 19 Order
4. Take some other action deemed appropriate